AMANAH FINANCE MALAYSIA BERHAD

v.

AURA VISTA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: D3-22-1234-1998]
5 AUGUST 1999

CIVIL PROCEDURE: *Stay of proceedings - Transfer of case - Whether court has power to transfer proceeding - Courts of Judicature Act 1964, sch. 12 - Whether an application for transfer should be made to Chief Judge - Courts of Judicature Act 1964, s. 20 - Failure to make said application - Whether stay ought to be granted*

The plaintiff sought repayment of a loan granted to the 1st defendant and guaranteed by the other defendants. The 2nd and 3rd defendants sought for the case to be transferred from Kuala Lumpur to Pulau Pinang, and for a stay of the proceeding.

Held:

[1] From the facts, there was no ground for any argument that the High Court at Kuala Lumpur had no jurisdiction to hear the proceeding.

[2] The power to transfer a proceeding to any other court is contained in para. 12 of the schedule to the Courts of Judicature Act 1964. Any branch of the High Court cannot exercise the power to transfer a case to another branch of the High Court until the requisite rules have been made. In practical terms, it has no exercisable power to order any such transfer, and the schedule merely provides an enabling provision to set up the procedures for such power.

[2a] The defendants were not without any alternatives and could make an application to the chief judge. An application to the chief judge is a clear basis for an application for a stay of the proceedings to be considered by the branch of the High Court hearing the matter, pending a decision by the chief judge.

[3] Much of the arguments herein was based on simple convenience of the defendants and little effort was made to show why the case should be more appropriately conducted in Pulau Pinang. If the matter involves property or works or large numbers of witnesses located in Pulau Pinang,

a then the case should be more appropriately conducted in Pulau Pinang. But this case involved only a loan transaction. Convenience alone was a weak persuasion.

[4] No application had been made under s. 20 of the Courts of Judicature Act 1964 to the chief judge for the matter to be transferred to Pulau Pinang. Without it, there was no basis for a stay of the proceeding to be considered at this time. If a stay was granted and an application to the chief judge delayed or not made, this proceeding would be left hanging in the air.

[Applications rejected with costs.]

Case(s) referred to:

Abdullah Haji Lamat v. Supreme Finance (M) Sdn Bhd [1993] 1 AMR Supp Rep 116 ***(refd)***

American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 ***(refd)***

Charles Duval & Co Ltd v. Gans & Anor [1904] 2 KB 685 ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 ***(refd)***

Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 ***(refd)***

Re Application of Asia Assurance Co Ltd [1968] 2 MLJ 228 ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(refd)***

Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Wee Kee Puan v. Oversea-Chinese Banking Corporation Ltd [1982] 1 MLJ 64 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 20, 23, 25(2), para 12 of sch

For the plaintiff - R Jayasingam; M/s WY Chan & Roy

For the 1st defendant - Lalitha Menon; M/s Lalitha Menon & Assocs

For the 2nd defendant - SJ Ooi (WC Wong with him); M/s. Wong-Chooi & Mohd Nor

For the 3rd defendant - Habib Rahman; M/s T Tharuma & Assocs

For the 4th & 5th defendants - Adrian Choong; M/s Moi Asamaley & Choong

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

The plaintiff Amanah Finance Malaysia Berhad had filed a writ of summons on 27 April 1998 seeking payment of a sum of RM7,122,614.06 as at 28 February 1998, interest at 1.75% per annum above the base lending rate with monthly rests, additional interest of 1% per annum calculated on daily

basis, both upon the amount outstanding payable from 1 March 1998 until full settlement, costs and such other order as the court thinks fit, in respect of a loan granted to the 1st defendant and guaranteed by the 2nd, 3rd, 4th and 5th defendants. Conditional appearances were entered on 12 June 1998, 13 June 1998 for the 2nd defendant, 3rd defendant. The 1st, 4th and 5th defendants filed their appearances on 8 June 1998.

Before the court is an application (encl. 30) by the 2nd defendant for orders that:

1. bahawa semua prosiding dalam tindakan ini digantung sehingga permohonan ini dibicarakan dan diputuskan oleh Mahkamah yang Mulia ini;

2. bahawa tindakan ini atau keseluruhan prosiding-prosiding didalam tindakan ini digantungkan;

3. secara alternatif, bahawa tindakan ini dipindahkan ke Pulau Pinang;

4. bahawa kos permohonan ini dibayar serta-merta oleh Plaintif kepada Defendan Kedua; dan

5. lain-lain relif dan/atau relif selanjutnya yang difikirkan sesuai dan adil oleh Mahkamah yang Mulia ini.

Also before the court is an application (encl. 26) by the 3rd defendant Ng Sim Hock @ Ng Lim Hock, for the following orders:

1. Kes ini dipindahkan ke Mahkamah Tinggi Pulau Pinang.

2. Tempoh masa pemfailan pembelaan dilanjutkan sehingga selepas pendengaran permohonan di atas.

3. Kos didalam kausa.

The Mr. S J Ooi who appears for the 2nd defendant, submitted on the basis that all the defendants and their counsel reside in Penang, the documentation for the loan was done by a lawyer in Penang, the loan repayments were made to a branch of the plaintiff company in Penang, the letters of guarantee were executed by the guarantors in Penang. It was argued by Mr. S J Ooi that all the relevant facts arise, in respect of the 1st defendant, in Penang. In respect of the guarantors he argued that the cause of action arise from the demand guarantee which was also issued to the other defendants in Penang. It was therefore argued it was unreasonable for the defendants to be burdened by coming to Kuala Lumpur.

The plaintiff's maintained that the cause of action arose in Kuala Lumpur because the plaintiff's address is in Kuala Lumpur, the letter of offer of the loan was issued from Kuala Lumpur, the sample draw-down notice was also an instruction from Pulau Pinang to the plaintiff's branch in Kuala Lumpur, and there is nothing in the loan documentation specifying that repayments should be made only to the branch in Pulau Pinang. It was also submitted that a stay may only be granted if the defendants had made an application to the Chief Justice of Malaya under s. 20 of the Courts of Judicature Act 1964, and since the defendants had not made such application, the application for transfer ought to be dismissed with costs.

From the facts, there is no ground for any argument that the High Court at Kuala Lumpur has no jurisdiction to hear the proceeding: see *Re Application of Asia Assurance Co Ltd* [1968] 2 MLJ 228; *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1990] 1 CLJ 176; [1989] 3 MLJ 509. But that, as has been explained in *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 by Lim Beng Choon J, is not the end of the matter since the next question is the question of forum conveniens. Section 23 of the Courts of Judicature Act was enacted as a basis for the civil jurisdiction of the High Courts. Even so, in the particular circumstances of a case, it may well arise that two branches of the High Court have jurisdiction under s. 23, in which case the court will have to exercise its discretion judicially having regard to all the circumstances of the case, whether to hear the case itself or to transfer the case to another branch of the High Court. Thus the High Court in *Abdullah bin Haji Lamat v. Supreme Finance (M) Sdn Bhd* [1993] 1 AMR Supp Rep 116 considered all the circumstances of that case instead of confining itself to the terms of the agreement alone.

With regard to the guarantors, the case *Wee Kee Puan v. Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 64 FC is only authority for the proposition that a cause of action arises against a surety only when a demand is made. It did not decide where the action is to be commenced.

The power to transfer a proceeding to any other court is contained in para. 12 of the Schedule to the Courts of Judicature Act 1964:

> 12. Transfer of Proceedings.
>
> Power to transfer any proceedings to any other court or to of from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof.
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

The proviso is a condition precedent to the exercise of the power under the paragraph. This question has been dealt with by Augustine Paul J in *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22, 33-38 with whose reasoning I fully agree with. I would add however that the schedule itself is made under s. 25(2) of the Courts of Judicature Act which itself is subject to the proviso:

> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Briefly therefore, the High Court, meaning any branch of the High Court, cannot exercise the power to transfer any case to another branch of the High Court until the requisite rules have been made. In practical terms, it has no exercisable power to order any such transfer, and the schedule merely provides an enabling provision to set up the procedures for such power.

As explained in *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22, 38 the defendants are not without alternatives. Section 20 of the Courts of Judicature Act provides for an application to be made to the chief judge:

> 20. Distribution of business.
>
> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

Where an application to the chief judge has been made, there is then clear basis for an application for a stay of the proceedings to be considered by the branch of the High Court hearing the matter, pending a decision by the chief judge. Evidence of such application should be exhibited in an affidavit supporting the application for a stay of the proceeding.

The fact that no rules have been made to make the power under para. 12 of the schedule can only underline the view that it is not intended that a transfer of a case is to be treated lightly as expedient to pass the burden of deciding a case to another court. Peh Swee Chin FCJ, speaking for the Supreme Court in *American Express Bank Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 said:

> The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v. Cansulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, '*Stay of Actions and Forum Non Conveniens*' [1994] 3 Mlj xcvii.

a The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v. Robinow* (1892) 19 R (Ct of Sess) 655 at p 668 as being the fundamental principle in regard to this doctrine, *ie*, that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and for the ends of justice. Lord Goff cautioned that the word 'conveniens' in forum non b conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

Much of the argument is based on simple convenience of the defendants, and little effort is made to show why the proceeding is more appropriately c conducted in Pulau Pinang. The distinction is this. If the matter involves property or works or large numbers of witnesses located in Pulau Pinang, then clearly the proceeding is more appropriately conducted in Pulau Pinang. But this case involves a loan transaction only. Convenience alone is weak persuasion with regard to the question of appropriateness that the proceeding d in this case be conducted in Pulau Pinang. There is little purpose relying on cases nearly a hundred years ago such as *Charles Duval & Co Ltd v. Gans & Anor* [1904] 2 KB 685 when travel and communication were at a rudimentary stage compared to 1999 even in this humble land. The proceeding involves a loan, repayments and guarantees that are not themselves site e specific. But most telling of all, no application under s. 20 of the Courts of Judicature Act 1964 has been made to the chief judge for the matter to be transferred to Pulau Pinang. Without it there is no basis for a stay of the proceeding to be considered at this time. See for example *Paruvathy a/p Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113. It is an application f that can be made at any time by counsel. If a stay is now granted, and an application to the chief judge is delayed, or worse still, not made, this proceeding would be left hanging in the air.

In all of the circumstances of the case I have rejected the applications with costs.

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